

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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MAUREEN MCPADDEN

v.

WALMART STORES EAST, LP, ET AL.

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14-CV-475-SM

January 26, 2016

9:15 a.m.

TRANSCRIPT OF JURY TRIAL
DAY FOUR - MORNING SESSION
BEFORE THE HONORABLE STEVEN J. MCAULIFFE

APPEARANCES:

For the Plaintiff:

Richard E. Fradette, Esq.
Holly Ann Stevens, Esq.
Beliveau, Fradette & Gallant, Esq.

Lauren S. Irwin, Esq.
Upton & Hatfield, LLP

For the Defendant:

Christopher B. Kaczmarek, Esq.
Joseph A. Lazazzero, Esq.
Littler Mendelson, PC

Court Reporter:

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Official Court Reporter
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I N D E X

<u>WITNESSES:</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
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HEATHER HARRIS MCCAFFREY:

(Continuation of viewing of videotaped deposition)

BARBARA KULWICKI:

By Ms. Irwin	12
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EXHIBITS:

<u>FOR ID</u>	<u>IN EVD</u>
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Plaintiff's Exhibit 52.	54
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1 P R O C E E D I N G S

2 (IN COURT - NO JURY PRESENT)

3 THE COURT: Last night it occurred to me -- I
4 did stress you don't have to write a memo, just cite me
5 the cases, right?

6 MS. IRWIN: I think you had said that it could
7 be sort of barebones. It didn't have to be --

8 THE COURT: Yes. Just cite me the cases.
9 Write what you want, but don't feel you need to write a
10 memo.

11 In the meantime, take a look -- if you haven't
12 seen it already, I'm sure you're familiar with it.

13 I know you're probably familiar with it, Mr.
14 Kaczmarek.

15 You may or may not be.

16 Soto-Feliciano versus Villa Cofresi, 779 F.3d
17 19. It's about a year ago from the First Circuit.

18 MS. IRWIN: Yes.

19 THE COURT: I'm not entirely sure how this
20 squares with the Supreme Court precedent in the area.
21 However, I guess I don't have to worry about that
22 because it's First Circuit precedent.

23 It makes the point that I've been struggling
24 with, though. "Plaintiff must elucidate specific facts
25 which would enable a jury to find that the reason given

1 is not only a sham but a sham intended to cover up the
2 employer's real motive" in that case age discrimination,
3 "which led me to the following thought experiment that
4 may be invalid."

5 I haven't had time to think it through really,
6 but you haven't brought an age discrimination claim
7 here.

8 But let's assume you did, just as a thought
9 experiment. Your client is over 40 in a protected
10 class. Mr. Tau is obviously under 40. He got a one
11 level under let's say substantially similar
12 circumstances. Your client got a two level. What else
13 is there?

14 You would say, I think, that's enough to go to
15 the jury because we've, you known, shown that the
16 policies they cited don't really say fire somebody.

17 How does that differ from your FMLA claim? It
18 strikes me that it doesn't. That the evidence --
19 remember I was talking about the box of evidence that
20 you say you would just point to the box and say, that
21 box, that box shows age discrimination, or at least
22 raises the specter sufficiently that a jury could
23 reasonably conclude that the real motivation was age
24 discrimination.

25 Same with race. She's Caucasian. Tau is

1 obviously Asian. He didn't say anything about race.
2 There's no smoking gun. But on the other hand, I think
3 you would say, well, that box. Something bad happened
4 to me. I'm in the protected class. I'm Caucasian.
5 He's Asian. He got one level. I got two levels. What
6 more do you need? I think in either case I'm not sure
7 that would work.

8 But that's what I'm struggling with. You
9 don't have to show your cards yet.

10 MS. IRWIN: Your Honor, we are aware of that
11 case, and we would point out that in that case for the
12 retaliation claim the plaintiff did not have any direct
13 or circumstantial evidence that the employer said or did
14 anything to suggest retaliatory animus for the complaint
15 of age discrimination.

16 THE COURT: Yes, and that differs from this
17 case how?

18 MS. IRWIN: And the plaintiff -- we have
19 retaliation claims, our whistleblower, our wrongful
20 termination.

21 THE COURT: Oh, claims. Evidence, I thought
22 you said.

23 MS. IRWIN: And they --

24 THE COURT: No, no. I thought you said the
25 distinction is in that case they didn't have evidence.

1 MS. IRWIN: Well, what I understood that your
2 Honor was struggling with yesterday was whether we
3 needed sort of direct -- or what kind of evidence did we
4 need to demonstrate retaliatory animus.

5 THE COURT: We don't say pretext plus anymore,
6 of course. But whatever concept has replaced it, which
7 has been ill-defined in my view, the concept is, I
8 believe, something like, there is a quantum of evidence
9 required that goes beyond the prima facie case, and the
10 courts are very vague about what that looks like and how
11 you discern whether it's present or not present.

12 And the answer seems to be, from the Supreme
13 Court at least, you know, if you have a strong prima
14 facie case, whatever the heck that means, and there's
15 some other evidence, some circumstances that will be
16 enough to get to the jury, and sometimes it won't be,
17 and, you know, just decide.

18 The First Circuit, however, seems to take a
19 more rigid view. They seem to say, no, no, no. You
20 really do have to have evidence that the pretext is in
21 fact pretext to cover up discriminatory animus. It's
22 not enough to just show pretext. It's got to be
23 something more than that.

24 MS. IRWIN: Well, I guess I would just point
25 particularly on the retaliation claims that we have.

1 The case that your Honor has just cited just talked
2 about the fact that there didn't have to be specific
3 direct or circumstantial evidence of the retaliatory
4 animus, but that we were able to show pretext by
5 temporal proximity, gaps and inconsistency in the
6 evidence regarding the misconduct, and that the
7 plaintiff had raised concerns several times right before
8 he was terminated.

9 So we have demonstrated that evidence. I'm
10 certainly going to give some more thought to whether the
11 -- sort of the status-based claim, like the disability
12 claim.

13 Gender -- I would say when there is a decision
14 maker who specifically knows that a female pharmacist
15 has been a second level discipline and that's why she's
16 consulted, and she's consulted for consistency, and one
17 of the reasons for consistency is to make sure men and
18 women are treated the same, and then she says, oh,
19 forget it, let's give the man a first level -- Barbara
20 Kulwicki knew of gender. That doesn't have to just be
21 Mr. Certo.

22 And we also had evidence yesterday from Mr.
23 Certo that he did treat Mr. Varieur leniently with
24 respect to discipline. That he viewed Ms. McPadden's
25 complaints as aggressive; whereas when Mr. Varieur

1 raised any sort of concern it was viewed as constructive
2 and a good thing to do.

3 So I think we have gender bias and we have
4 some direct evidence of gender discrimination.

5 But, your Honor, I think we will seriously
6 think about the disability status claim.

7 The other things are based on reporting, and I
8 do think that the law on retaliation -- the evidence has
9 been met on those issues.

10 THE COURT: Here's another case you might want
11 to take a look at. I'm sure, again, Mr. Kaczmarek, this
12 is your field, but it's Ray v. Ropes & Gray, 799 F.3d
13 99. It's also a 2015 case out of the First Circuit.

14 MS. IRWIN: Your Honor, the other cases that
15 we were pulling up last night included the Billings
16 case, which is Billings versus Town of Grafton. That
17 says that pretext can be established through
18 circumstantial evidence alone, and that conflicting
19 accounts made by the defendants regarding who made the
20 decision and how it was made can serve as evidence of
21 pretext if an employer's different and arguably
22 inconsistent explanations for its challenged employment
23 action can serve as evidence of pretext.

24 THE COURT: What's the cite?

25 MS. IRWIN: Billings is -- I'm sorry. Just

1 one second. 515 F.3d 39, a First Circuit case from
2 2008.

3 And then pretext can be shown through
4 circumstantial evidence alone is that Soto-Feliciano
5 case that your Honor cited.

6 And then we also have temporal proximity,
7 which is from Cooper versus Thomson Newspapers, 6
8 F.Supp. 2d 109.

9 THE COURT: How does temporal proximity work
10 with gender? I mean, there's no --

11 MS. IRWIN: No, no. The temporal proximity
12 doesn't work with the gender, I agree with you, your
13 Honor, but it does work with all of the other issues.
14 All of the other claims have to do with temporal
15 proximity. It's when she raised the issues. She has
16 the meeting. She raises the issue. He gets frustrated,
17 and then he looks for discipline.

18 THE COURT: Okay.

19 MR. KACZMAREK: Your Honor, if I may. Just
20 the one case that I would add to the mix, in addition to
21 the ones that your Honor cited, would be Alvarez-Fonseca
22 versus Pepsi Cola, 152 F.3d 17.

23 THE COURT: First Circuit?

24 MR. KACZMAREK: Yes, your Honor.

25 MS. IRWIN: I'm sorry, your Honor. One final

1 one that I think is important to our analysis is in the
2 case of Harrington versus Aggregate Industries
3 Northeastern Region. The Court stated that in
4 retaliation cases the whole is sometimes greater than
5 the sum of the parts. That bits and pieces of evidence
6 taken collectively have significant probative value.
7 And we think that's consistent with your Honor's order
8 on summary judgment. We looked at all of the evidence
9 and the inferences that the jury could make based on
10 light most favorable to the plaintiff, and we've proven
11 -- we're going to have proven by the end of the trial
12 all of the items that your Honor listed in that order
13 and more.

14 THE COURT: What's the cite?

15 MS. IRWIN: Sorry. That is 668 F.3d 25, a
16 First Circuit 2012 case.

17 THE COURT: Okay. That's great.

18 Do we have an hour left?

19 MR. KACZMAREK: Hour and a half.

20 MR. FRADETTE: Approximately an hour and a
21 half, your Honor.

22 THE COURT: Total?

23 MR. FRADETTE: Total. So this one here is
24 going to go about 20 minutes. Then I'm going to put the
25 next disc in, which is exactly 48 minutes.

1 THE COURT: Okay.

2 (IN COURT - JURY PRESENT)

3 THE CLERK: Court is in session and has for
4 consideration jury trial, day four, in the matter of
5 Maureen McPadden versus Walmart Stores East, LP, et al.,
6 case number 14-CV-475-SM.

7 THE COURT: All right. Good morning, ladies
8 and gentlemen. I apologize for the delay. It was my
9 bad. I had issues to discuss with the lawyers this
10 morning.

11 We're going to continue with this deposition.
12 Again, I know it's tough watching a video deposition,
13 but we only have an hour and a half to go with a little
14 break in between. So I think we'll probably just try to
15 run it out and get it behind us.

16 Any other administrative things? No? There
17 will be a switch somewhere after about an hour, I
18 suppose, or 45 minutes.

19 All right. Mr. Fradette, whenever you would
20 like.

21 MR. FRADETTE: Thank you, your Honor.

22 Ladies and gentlemen of the jury, we're going
23 to begin with Exhibit 22. So when the tape resumes,
24 they're going to be talking about Exhibit 22.

25 (Continuation of viewing of videotaped

1 deposition of Heather Harris McCaffrey)

2 (Conclusion of viewing of videotaped

3 deposition of Heather Harris McCaffrey)

4 (RECESS)

5 MS. IRWIN: The plaintiff calls Barbara
6 Kulwicki.

7 BARBARA KULWICKI

8 having been duly sworn, testified as follows:

9 THE CLERK: For the record, please state your
10 name and spell your last name.

11 THE WITNESS: Barbara Kulwicki,
12 K-U-L-W-I-C-K-I.

13 DIRECT EXAMINATION

14 BY MS. IRWIN:

15 Q. Good morning, Ms. Kulwicki.

16 A. Good morning.

17 Q. We have not met in person before, but we met
18 through a video deposition while you were in Arkansas.
19 Do you recall that?

20 A. Yes, I do. Thank you.

21 Q. You've worked for Walmart since 1988?

22 A. Yes.

23 Q. Can you just briefly go through the different
24 positions you've held with Walmart?

25 A. When I joined Walmart, I was an assistant in

1 the legal department. And after two years or so there I
2 moved to the people division, personnel, and did some
3 special projects.

4 After the people division and the special
5 projects area I moved to the photo division and was a
6 human resource manager for the photo division.

7 After the photo division I moved to compliance
8 and worked in the wage and hour group.

9 After compliance I moved to the pharmacy
10 division, and then the pharmacy division has merged with
11 Health and Wellness now.

12 Q. Thank you. And you hope to work for Walmart
13 until you retire?

14 A. Yes. Uh-huh.

15 Q. And your current position is divisional senior
16 human resources manager?

17 A. That's correct.

18 Q. And you've held that position since June of
19 2005?

20 A. Yes.

21 Q. And that includes that you held that position
22 in 2012?

23 A. That's correct.

24 Q. Okay. And you are responsible for providing
25 human resources advice and guidance concerning

1 associates employed in Walmart's pharmacies, including
2 those employed at the Seabrook pharmacy?

3 A. That's correct.

4 Q. During your deposition we marked a job
5 description for you. It's Exhibit 64. I'll just bring
6 to your attention there were two job descriptions,
7 because this first one, regional human resources
8 director, is what your job was called when this was
9 published in 2010. But then you confirmed for me that
10 your current title of senior manager human resources
11 Health and Wellness is the same job, same duties, that
12 you held in 2012; is that right?

13 A. Yes.

14 Q. Okay. So I'm going to use this description
15 that has your current title on it to talk with you about
16 it.

17 Your job requires you to ensure compliance
18 with the laws, right?

19 A. Yes.

20 Q. And your job requires you to promote and
21 support the standards of ethics and integrity by
22 providing direction to others and ensuring compliance
23 with them?

24 A. Yes.

25 Q. Okay. And then we're going to turn to the

1 second page of this job description. Part of your job
2 is to make informed judgments. Do you see that?

3 A. Yes.

4 Q. And that goes on to say that you need to
5 identify and apply sound fact-based criteria in making
6 decisions, right?

7 A. Yes.

8 Q. And you need to integrate knowledge and
9 expertise in making fact-based recommendations and
10 decisions, right?

11 A. Yes.

12 Q. Okay. And part of your role is to help
13 Walmart be consistent with discipline in the region,
14 right?

15 A. Yes.

16 Q. And being consistent ensures that those who
17 have raised concerns are not treated more harshly than
18 those who have not, right?

19 A. Yes.

20 Q. And it would also ensure that women are not
21 disciplined more harshly than men?

22 A. Yes.

23 Q. And that's really an essential part of your
24 job is to ensure compliance with the laws, right?

25 A. Yes.

1 Q. When I took your deposition -- and that was
2 just about two months ago. Do you remember that?

3 A. Yes.

4 Q. You told me that you didn't think it was
5 possible to make sure that the people in the field
6 follow every law at Walmart, right?

7 A. I'm, you know, one person, and we have -- I'm
8 responsible for an entire division, 650 stores right
9 now, and so to ensure that everybody is following
10 everything every minute of the day would be difficult at
11 best.

12 Q. Yeah. And so when I took your deposition --
13 if you could just turn to page 39. Actually, back then
14 you told me you were responsible for a thousand stores.

15 A. At one point I was covering two divisions.

16 Q. When was that?

17 A. Up until about August of this year.

18 Q. So in 2012 you were covering two divisions?

19 A. Yes.

20 Q. Okay. And so was that over a thousand stores?

21 A. Yes.

22 Q. Okay. So you had a lot to do in 2012?

23 A. Yes.

24 Q. Okay. So when I asked you -- on page 39, I
25 said, "Don't you also have to make sure that the people

1 out in the field are following the laws?" You answered,
2 "I don't think that's possible to make sure that they're
3 following the laws or make sure that everybody in a
4 thousand stores are following every single law that's
5 out there. When I talk to people, I certainly would
6 have that as a goal."

7 Do you still agree with that testimony?

8 A. Yes.

9 Q. Okay. And so really you view your job as
10 having a goal to make sure your advice is consistent
11 with the law, but you don't view your job as ensuring
12 that the managers actually follow the law?

13 A. When I'm involved -- again, that is certainly
14 what I strive for is to make sure that everybody follows
15 the laws.

16 Q. Okay. And it's a goal?

17 A. That's what I strive for, yes.

18 Q. Yes. And you've been trained on the laws,
19 including the disability laws, the FMLA, and Title VII?

20 A. Yes.

21 Q. And you've been trained on HIPAA?

22 A. Yes.

23 Q. And if a manager says that he's been trained
24 on HIPAA, that includes being trained that complaints
25 need to be investigated, right?

1 A. Yes.

2 Q. And you told me that you haven't attended any
3 conferences on whistleblower or wrongful termination or
4 retaliation or gender discrimination in the last ten
5 years?

6 A. If that was my testimony, that's true.

7 Q. Okay. And you can't recall any Walmart
8 webinars on whistleblowers or wrongful termination or
9 retaliation or gender discrimination in the last ten
10 years?

11 A. I don't recall. No, I don't have a memory of
12 it.

13 Q. Okay. And you used to have a certification
14 with the National Society for Human Resource Management?

15 A. That is true.

16 Q. Which is called SHRM?

17 A. Yes.

18 Q. But you let that lapse, right?

19 A. Yes. Yes, I did.

20 Q. And that organization would require you to
21 have regular training, right?

22 A. Yes.

23 Q. And even though you were the senior human
24 resource manager responsible for compliance with
25 employment laws for pharmacies in New Hampshire, you

1 don't know anything about New Hampshire's
2 antidiscrimination law, right?

3 A. Specifically -- our policies have specific
4 state laws imbedded in them. So when I access a policy
5 and there is something specific about the state, I would
6 access that state within that policy.

7 Q. But, ma'am, when I asked you about New
8 Hampshire's antidiscrimination law, you told me that you
9 didn't know if you had ever even looked at New
10 Hampshire's antidiscrimination law.

11 A. I'm not disagreeing with that. I'm just
12 saying that our policies do have imbedded in them
13 state-specific information.

14 Q. Do you have any present recollection of
15 anything about New Hampshire's antidiscrimination law
16 that you didn't have when I asked you at your
17 deposition?

18 A. No.

19 Q. Okay. And you understand that Walmart cannot
20 lawfully retaliate against an employee for raising
21 safety concerns?

22 A. Yes.

23 Q. And you understand that Walmart cannot
24 lawfully retaliate against an employee for raising a
25 HIPAA violation?

1 A. Yes.

2 Q. And you understand that the company cannot
3 lawfully retaliate against an employee because she
4 requests FMLA leave?

5 A. Yes.

6 Q. Or because she raised a concern about the
7 designation of the FMLA leave?

8 A. Yes.

9 Q. Or because she said she may need to take more
10 FMLA leave in the future?

11 A. Yes.

12 Q. Okay. And you understand that anxiety and
13 depression may qualify as a serious medical condition
14 under the FMLA?

15 A. Yes.

16 Q. And also may be considered a disability under
17 the ADA?

18 A. Yes.

19 Q. And you understand that the company cannot
20 treat men more favorably than women with respect to
21 discipline?

22 A. Yes.

23 Q. And you actually know of this concept called
24 pretext, and you understand that to mean that an
25 employer cannot use an --

1 THE COURT: Well, no. I don't think you
2 should be using the witness as a sounding board for
3 elucidating legal principles. I'll instruct the jury on
4 the law to apply in deliberating. So, you know, facts
5 you're eliciting, not do you agree with me that the law
6 says X, okay?

7 MS. IRWIN: Okay.

8 Q. Ms. Kulwicki, you understand that Walmart
9 cannot use an excuse --

10 THE COURT: No, no. Objection to resume is
11 sustained. Facts.

12 MS. IRWIN: Well, she's the senior resource
13 person who was involved in --

14 THE COURT: Yes. What did she do? What did
15 she know based on personal knowledge? What happened?
16 What did she observe? That kind of thing. Not do you
17 agree with my X elucidation of the applicable law. Not
18 that.

19 MS. IRWIN: Your Honor, may we approach for
20 just a moment, please?

21 THE COURT: Sure.

22 (SIDEBAR)

23 MS. IRWIN: My purpose in asking these
24 questions is she has the responsibility to make
25 knowledgeable decisions, and her job responsibility

1 involves having to know about these issues so it's
2 important that she knows she had the responsibility.

3 THE COURT: Just ask her. You can't be giving
4 a recitation of what the applicable law is in your sort
5 of advocacy way and convey to the jury somehow your
6 suggestion is what the law is. It's not about her
7 knowledge of the law. Whether she knows what's required
8 or not required is not outcome determinative here. It's
9 what did she do.

10 MS. IRWIN: It's her job duties.

11 THE COURT: But you're not doing that; hence
12 my objection.

13 MS. IRWIN: But I'm trying to figure out how
14 she understood it was her duty to --

15 THE COURT: No. You're asking her if she
16 understands your view of the law is correct. We're not
17 interested in your view of the law or whether it's
18 correct. I'll tell the jury what the applicable law is.

19 All you have to get from this witness is what
20 did she know based on personal knowledge, what did she
21 observe, what the facts are.

22 MS. IRWIN: And what her responsibility is.

23 THE COURT: You know that.

24 MS. IRWIN: But she has to have the facts to
25 give advice. I don't want to get another objection.

1 MR. KACZMAREK: And she's already testified
2 that the company can't discriminate or retaliate.

3 THE COURT: She's an educated person. You're
4 not going to educate her on the stand. You're not going
5 to convey to the jury what you think her job
6 understanding should be. She's a witness.

7 What do you know based on your personal
8 knowledge, your observations? What happened? What did
9 you do? What did you hear? What did you say? That
10 sort of thing. Not do you agree with me that prima
11 facie case is good enough.

12 MS. IRWIN: Well, one of the final issues is
13 we have a reckless indifference standard for some of our
14 damages, and she's the one who is supposed to be making
15 sure that Walmart is complying with the law. And she
16 knew what the law was, and she didn't do anything to
17 comply. So it's an important part of our enhanced and
18 punitive damage argument. I don't see how we get
19 reckless disregard evidence from her unless we have her
20 knowing of the responsibilities and failing to --

21 THE COURT: Your questions right now, A,
22 they're not evidence. They seem to me quite
23 argumentative. You're implying that -- I don't know
24 what you're implying. Without evidence you're
25 suggesting Walmart didn't do any of these things.

1 Why don't we first establish whether they
2 violated some requirement or not and then ask her if she
3 knows that that's a violation.

4 MS. IRWIN: Okay.

5 MR. FRADETTE: If the question were put such
6 as, what do you understand pretext to mean --

7 THE COURT: No, no, no. Not even close.

8 MS. IRWIN: I'll switch the order.

9 (CONCLUSION OF SIDEBAR)

10 Q. Ms. Kulwicki, I'm going to first cover -- move
11 to covering your involvement with Mr. Certo, okay?

12 A. Okay.

13 Q. You don't recall Joe Certo ever getting you
14 involved to talk about discipline when Josh Varieur
15 failed to have log copies completed, right?

16 A. No.

17 Q. Okay. And you don't recall Joe Certo ever
18 getting you involved to talk about discipline when Josh
19 Varieur had a dispensing error in 2012, right?

20 A. No.

21 Q. Okay. And you don't recall Joe Certo ever
22 getting you involved when Maureen McPadden raised
23 serious safety concerns from August through November of
24 2012?

25 A. No.

1 Q. And you agree that Maureen had the right to
2 raise safety concerns and that raising those concerns is
3 something that Walmart protects under its policies?

4 A. Yes.

5 Q. And you agree that it's a market director's
6 responsibility to ensure that a safety concern is looked
7 into?

8 A. Yes.

9 Q. And you provide guidance to market managers on
10 how to conduct investigations?

11 A. Yes.

12 Q. And you don't recall Joe Certo consulting with
13 you when Maureen raised a serious HIPAA violation in
14 October of 2012?

15 A. No.

16 Q. And you agree that the protocol in
17 investigations says that any conversations for that type
18 of investigation should be documented?

19 MR. KACZMAREK: Objection.

20 THE COURT: Overruled.

21 A. A HIPAA violation is investigated by the HIPAA
22 group -- should be investigated by the HIPAA group.

23 Q. But anyone who takes on a HIPAA investigation
24 should be documenting it?

25 A. Yes, yes.

1 Q. And witnesses should be present to take notes?

2 A. Yes. That would be standard practice.

3 Q. And the associate who is accused of the
4 misconduct is typically asked to write a statement?

5 A. Yes.

6 Q. And in your opinion if a market manager told
7 you that an associate had reported that a technician had
8 violated HIPAA, it would need to be investigated?

9 A. I would advise them to contact the HIPAA
10 group, yes.

11 Q. But you believe it would need to be
12 investigated?

13 A. Yes, yes.

14 Q. Okay. And you don't recall Joe Certo telling
15 you or getting you involved when in October of 2012 he
16 met with Maureen McPadden and she raised a serious HIPAA
17 violation, raised safety concerns again, told him of her
18 medical condition, and told him that she may need an
19 additional medical leave, right?

20 A. No.

21 Q. And Joe Certo didn't tell you on the very
22 morning of November 26th when you approved discipline
23 later that day that he had e-mailed Josh Varieur and
24 said that he understood Mr. Varieur's frustration when
25 Maureen raised concerns about technicians not being

1 allowed to take bathroom breaks?

2 MR. KACZMAREK: Objection.

3 THE COURT: Well, overruled. But that -- I'll
4 tell you this at the end as well when I give you
5 instructions, but you should understand questions by
6 lawyers are not themselves evidence. So when a lawyer
7 asks a question that assumes a fact in the question,
8 that's not evidence of that fact, okay? Evidence of
9 facts come from the witnesses who are sworn to testify
10 and from documents and things that are admitted into
11 evidence.

12 So I've overruled the objection -- you
13 probably noticed hesitantly -- because the document is
14 in evidence. You can read the document. You can decide
15 for yourself what the document says and what its
16 implications are.

17 So that counsel suggests through the question
18 that it means one thing, that's not evidence that it
19 means that. You'll decide what the document means,
20 okay? All right.

21 Q. Ms. Kulwicki, I'll restate to make it easier.

22 Mr. Certo didn't mention anything to you about
23 a one hour meeting that he had with Ms. McPadden in mid
24 to late October where she raised a number of concerns,
25 correct?

1 A. That's correct.

2 Q. And he didn't mention to you that she had
3 indicated that she may need an additional medical leave?

4 A. No, he did not.

5 Q. Okay. And you actually knew about Ms.
6 McPadden's October -- late September, early October FMLA
7 leave, right?

8 A. No, I did not.

9 Q. Oh. I believe your affidavit said that you
10 were aware of that.

11 A. I am now, but I wasn't at the time.

12 Q. Ms. Kulwicki, if you could just look at
13 Exhibit 96, which is marked for ID.

14 A. Exhibit 96?

15 Q. Yes. It's your affidavit. I think it's right
16 next to you there. Not the deposition.

17 MR. FRADETTE: May I approach?

18 THE COURT: Anytime, Mr. Fradette.

19 MR. FRADETTE: It should be this document
20 right here.

21 THE WITNESS: Oh. The affidavit. Okay.

22 Q. And just to look at paragraph 6, does that
23 refresh your memory that you were aware that Ms.
24 McPadden had taken a leave of absence in 2012?

25 A. I really did not remember that, and I am not

1 involved in approving leaves of absences. We have a
2 central group that is called HRSS, Human Resources
3 Shared Services. So leaves of absences go into the
4 shared services group, and I am not involved in
5 approving those.

6 Q. And I'm not suggesting that you were involved
7 in approving it. I'm just pointing out that you made a
8 statement under oath in the past where you said that you
9 knew that Ms. McPadden had taken a leave -- at the time
10 that you made the coaching decision, you were aware that
11 Ms. McPadden had taken a leave of absence in 2012.

12 If that's not true, you can tell us, but it's
13 just that this was a statement that you submitted under
14 oath.

15 A. Like I said, right now I have no recollection
16 of knowing that, but perhaps -- you know, it's not
17 something that would have been on top of my mind.

18 Q. So you don't know if your sworn statement is
19 true or not as you sit here today?

20 A. At this point I don't have a recollection of
21 it.

22 Q. Okay. And back to the bathroom break issue.
23 You agree that employees should be given
24 bathroom breaks?

25 A. Oh, yes.

1 Q. And you would not support a manager holding up
2 bathroom breaks for Walmart's convenience?

3 A. No. Absolutely not.

4 Q. Okay. And so you were only asked to get
5 involved to discuss disciplining Maureen McPadden for
6 losing her key in November of 2012, right?

7 A. Would you say that again, please?

8 Q. Let me back up one step.

9 You don't recall any discussions with Mr.
10 Certo about Maureen raising concerns or indicating that
11 she may need another leave of absence, right?

12 A. No, I don't.

13 Q. So the first time in 2012 that any issues
14 regarding Maureen McPadden were brought to your
15 attention was when the issue of whether she should be
16 disciplined for losing her key was brought to your
17 attention?

18 A. Yes.

19 Q. Okay. Now I would like to get to that issue.

20 You do recall speaking with Heather McCaffrey
21 in late November of 2012 regarding Maureen McPadden?

22 A. Yes.

23 Q. Okay. And you obviously knew someone with the
24 name Maureen McPadden was female?

25 A. I would assume so, yes.

1 Q. Okay. And you don't remember if Joe Certo was
2 on the call with you and Ms. McCaffrey or not?

3 A. I remember speaking with Heather. I do not
4 remember Joe -- speaking with Joe at all.

5 Q. Okay. And did you understand from Ms.
6 McCaffrey that before the call with you Joe Certo had
7 already filled Ms. McCaffrey in on some of the facts?

8 MR. KACZMAREK: Objection.

9 THE COURT: Overruled.

10 A. I'm not -- would you repeat that, please?

11 Q. Why don't you tell us -- when you started the
12 call with Ms. McCaffrey, how did you understand, you
13 know, who had raised the issue and what the situation
14 was?

15 A. When Heather called, she simply told me that
16 there was a pharmacist that had lost their keys and
17 wanted to discuss it with me to determine what
18 accountability level there should be.

19 Q. Okay. And if Joe Certo testified that he was
20 on the call, you have no reason to dispute that?

21 A. Again, I didn't speak with Joe. If he was on
22 the call, he didn't speak on that call that I have any
23 memory of.

24 Q. And you've testified that it would have been
25 appropriate for Mr. Certo to be on the call if he wanted

1 to be involved?

2 A. Yes, it would have been appropriate.

3 Q. And Mr. Certo didn't indicate to you that he
4 had already sought advice from his peers about the
5 appropriate level of the discipline, right?

6 A. No.

7 Q. And it wasn't communicated to you in any way,
8 either through Mr. Certo or anyone else, that Mr. Certo
9 had already agreed with Don Wallis, his manager, that a
10 one level discipline was appropriate?

11 A. I don't know who Don Wallis was, but, no, I
12 had no knowledge of that.

13 Q. And certainly Mr. Certo could have raised that
14 issue to you as you've had done on other occasions?

15 A. Yes.

16 Q. And Mr. Certo did not tell you that there had
17 been an example raised to him that someone had been
18 disciplined for losing a key and not reporting it?

19 A. I did not speak with Joe prior to this.
20 Heather was on the call with me.

21 Q. Well, Joe Certo has testified that he was on
22 the call with you. So you don't know one way or the
23 other, right?

24 A. I did not speak with Joe. Now, he may have
25 been on the call, but I don't recall speaking with Joe

1 at all about this.

2 Q. Okay. But no one raised to you the example
3 that Mr. Certo was aware of about someone being
4 disciplined for losing a key and not reporting it?

5 A. Heather and I spoke about -- she gave me an
6 example of the Vision Center manager that was
7 terminated.

8 Q. That's somebody else. We'll get to her.

9 But you don't remember any discussion of an
10 employee who was disciplined for losing and not
11 reporting?

12 THE COURT: Specifically a pharmacist key?

13 A. No. No pharmacist. This was the first that I
14 was aware of of a pharmacist losing a key.

15 Q. And actually the example that was raised to
16 Mr. Certo from my understanding was not a pharmacist,
17 but it was someone who was given as an example by
18 Walmart in the litigation, and that's why I raise her.
19 But you have no knowledge of someone named Maria Holder,
20 and that person wasn't brought to your attention in
21 November of 2012?

22 A. No.

23 Q. Okay. Now, I'll represent to you that this
24 morning Ms. McCaffrey testified by videotape and she
25 said the reason that she consulted with you was to

1 ensure consistency in the region because you had the
2 broader knowledge of whether pharmacists have lost their
3 key before, whether there had been discipline, any of
4 those issues, okay?

5 But when I took your deposition, you testified
6 that you didn't do anything to ensure consistent
7 discipline for Ms. McPadden's key loss because you
8 thought the new matrix made past practice irrelevant?

9 A. That's correct.

10 Q. Okay. So even though the reason that you were
11 consulted was for consistency, that's not what you did
12 for Ms. McPadden?

13 MR. KACZMAREK: Objection.

14 A. That's correct.

15 THE COURT: Overruled.

16 Q. Okay. And you certainly could have pulled
17 other managers, HR people, to determine if other
18 pharmacists have lost their keys and what the discipline
19 had been?

20 A. In other areas of the country, yes. Yes.

21 Q. And so you were relying on this new matrix to
22 sort of start a whole new world of what the discipline
23 should be for Ms. McPadden?

24 A. Yes.

25 Q. Okay. And that's Exhibit 15? Is this the

1 matrix that you're talking about?

2 A. Yes.

3 Q. But when we looked at this matrix during your
4 deposition, you had to admit that losing the key and
5 properly reporting it was not an exact match for
6 anything listed on that matrix?

7 A. That's correct.

8 Q. Okay. And then when I asked you to sort of
9 tell us what had been discussed and led you and Ms.
10 McCaffrey, and possibly Mr. Certo, to determine that
11 discipline was appropriate, you testified, "I guess it's
12 No. 3, leaving the facility and leaving the pharmacy
13 unsecured when no pharmacist is present," right?

14 MR. KACZMAREK: Objection.

15 THE COURT: Sustained. But maybe you should
16 come to the sidebar.

17 (SIDEBAR)

18 THE COURT: You know, I know -- maybe you're
19 trying to save time, but the witness is here so you have
20 to ask the questions. What you're doing is reciting her
21 deposition and having her agree to it. That's an
22 improper use of the deposition.

23 She can testify. If she says something
24 inconsistent, then you can use the deposition.

25 MS. IRWIN: Okay. Sure.

1 MR. KACZMAREK: Thank you, your Honor.

2 (CONCLUSION OF SIDEBAR)

3 Q. Ms. Kulwicki, back to November of 2012 when
4 you were discussing this matrix to determine what
5 discipline was appropriate.

6 Which number are you testifying was the number
7 that led you to believe Ms. McPadden should receive a
8 second level discipline?

9 A. We looked at No. 3 and No. 11.

10 Q. And which one did you believe applied to Ms.
11 McPadden's situation?

12 A. Neither one are exactly on point. They don't
13 talk about keys per se. They talk about the security of
14 the pharmacy and the fact that leaving it unsecured or
15 having it unsecured violates the matrix.

16 Q. Okay. And so you don't -- so when you and Ms.
17 McCaffrey talked about the matrix, you sort of concluded
18 that it didn't fall under the matrix but nevertheless
19 second level discipline was appropriate?

20 A. It made clear that the security of the
21 pharmacy was extremely important. No. 3 calls for
22 termination and No. 11 calls for a coaching, and we
23 discussed that. And we did discuss the fact that I was
24 aware of a store manager who was terminated for losing
25 his keys. Ms. McCaffrey talked about a vision center

1 manager who was terminated, and we talked about the fact
2 that the pharmacist losing her key did not rise to the
3 level of termination and so we talked about what level
4 of coaching there should be. We ended on second level
5 coaching.

6 Q. Okay. I just want to back up for a moment,
7 because you've just told me really the items in this
8 matrix don't apply and that your real issue was having
9 the pharmacy be unsecure due to a lost key was an issue,
10 right?

11 A. Yes.

12 Q. And that had certainly been the case before
13 this matrix came into effect, right?

14 A. Yes. I would take that very seriously. This
15 was the first situation that I was aware of of a
16 pharmacist losing a key.

17 Q. But that's because you didn't do any checking
18 because you decided that you needed to start all over
19 because of this matrix, right?

20 MR. KACZMAREK: Objection.

21 THE COURT: Overruled.

22 A. I had no knowledge of a pharmacist losing a
23 key.

24 Q. But you didn't look to see if your lack of
25 knowledge was actually the truth?

1 A. Not in my area. There was no pharmacist that
2 had lost a key in my area.

3 Q. You were going on your memory. You didn't do
4 anything to look it up, right?

5 A. Yes.

6 Q. Okay. And you and Ms. McCaffrey -- and Mr.
7 Certo says he was on the call. There was no discussion
8 of AP-05 on that call, right?

9 A. No.

10 Q. And AP-05 doesn't apply to pharmacists, right?

11 A. Not specifically, no.

12 Q. It wouldn't be a policy that would justify
13 discipline of Maureen McPadden in this case, right?

14 A. No. It's not what I would use.

15 Q. And in advising on discipline do you look to
16 see whether there's a policy that's been violated?

17 A. Yes.

18 Q. And you look at past practices?

19 A. Yes.

20 Q. And you look at what type of training there's
21 been?

22 A. Yes.

23 Q. And you look at what kind of communication has
24 been distributed?

25 A. Yes.

1 Q. But in this case you didn't look at past
2 practices because you were using this new matrix?

3 A. Yes.

4 MR. KACZMAREK: Objection.

5 THE COURT: Overruled.

6 Q. And you concluded that the matrix didn't
7 actually dictate that there had been a violation of the
8 matrix in this case?

9 A. That's true. I mean, you recognize that no
10 policy is ever going to cover every situation that you
11 can encounter.

12 Q. Sure. And I understand, and I'm sure you
13 understand, ma'am, Walmart doesn't have to have a
14 policy. We're just going over what Walmart has stated
15 as the justification for the disciplining of Ms.
16 McPadden.

17 And is it your testimony that the matrix was
18 the justification for the discipline that was imposed on
19 Ms. McPadden?

20 A. And the matrix references a policy.

21 Q. Okay. So is it your opinion that the matrix
22 justified -- is the policy?

23 A. That was the basis for it, yes.

24 Q. Okay. And you don't recall anyone telling you
25 during that call that Maureen was on a second level

1 discipline?

2 A. No.

3 Q. Okay. They told you that after the second
4 level decision had been made, right?

5 A. Yes. Several days.

6 Q. And no one suggested to you that Maureen was
7 not taking the issue seriously, right?

8 A. No.

9 Q. In fact, you knew that Maureen -- by the time
10 Maureen was fired, you had been told that she looked all
11 over her house and couldn't find the key?

12 A. Yes.

13 Q. And I think you've already mentioned Ms.
14 McCaffrey told you that she remembered a vision center
15 manager who had been terminated for losing keys?

16 A. Yes.

17 Q. Okay. Did you look up that person?

18 A. There would have been no way for me to look up
19 that one person.

20 Q. There was no way for you to look up that
21 person?

22 A. I did not know who she was referring to. She
23 did not give a name.

24 Q. Did you ask her to tell you which store it was
25 or what the person's name was or when the date was?

1 A. No, I didn't.

2 Q. So if you had actually looked up that
3 person -- we now know that's Susan Carroll, which is
4 Exhibit 18. And just looking at the manager comments on
5 that one, do you see that this person actually left the
6 keys in the lock overnight?

7 A. I see that, yes.

8 Q. Okay. But you didn't know that because you
9 didn't look her up, right?

10 MR. KACZMAREK: Objection.

11 THE COURT: Sustained. She didn't look it up.

12 Q. And looking at this, Ms. Carroll's exit
13 interview, she also left a spare set of keys in a drawer
14 which was unlocked and had access to HIPAA information?

15 MR. KACZMAREK: Objection, your Honor.

16 THE COURT: Sustained. I'm not sure why this
17 is relevant because the document is in evidence, right?
18 She was unaware of it. She has no personal knowledge of
19 it. She didn't look it up. So what can she possibly
20 offer?

21 MS. IRWIN: Okay. Thank you.

22 Q. And just back again, you -- just for a moment,
23 even if you had looked Ms. Carroll up, you've testified
24 there really wasn't any relevant comparator to you
25 because the matrix was brand-new?

1 A. The matrix was recently formulated and
2 distributed, yes. So it was the first time that I had
3 considered the security of the pharmacy with the matrix.

4 Q. Okay. And even during this litigation you
5 don't have any recollection of Mr. Certo asking you to
6 look into whether other pharmacists had actually lost
7 their keys and whether or not they had been disciplined
8 before Maureen McPadden?

9 MR. KACZMAREK: Objection.

10 A. No.

11 THE COURT: Overruled.

12 Q. I'm sorry?

13 A. No.

14 Q. No. And you have a short note documenting the
15 November 26, 2012, conversation, right? That's Exhibit
16 67.

17 A. Yes.

18 Q. Okay. And actually, will you look at the
19 front of the exhibit? It looks like sort of an
20 organizer book that goes from August 20th of 2012 to
21 November 29th of 2012. Do you see that?

22 A. Yes.

23 Q. Okay. And on the second page it simply says
24 Heather, and then what does it say after that?

25 A. RPh, which is pharmacist. Pharmacist lost

1 their key. Second level coaching.

2 Q. Okay. And how do we know what date that note
3 is?

4 A. I date the page -- the first page of each day
5 till the next day. So it would have been on the
6 previous page.

7 Q. Okay.

8 A. Or one of the previous pages.

9 Q. Okay. And so other than your writing the
10 words that you wrote, we don't know from this note
11 anything about the conversation that you had with Ms.
12 McCaffrey and possibly Mr. Certo?

13 A. That's correct.

14 Q. And after you and Ms. McCaffrey settled on a
15 second level discipline, were you told that this second
16 level would lead to Ms. McPadden's termination?

17 A. Not during that conversation. A couple days
18 later.

19 Q. Oh, a couple days later?

20 A. That's my recollection at this point, but it
21 was later. It was at least the next day or the day
22 after.

23 Q. Okay. And you said, well, the decision has
24 already been made so go ahead?

25 MR. KACZMAREK: Objection.

1 THE COURT: Sustained.

2 A. We talked about --

3 THE COURT: No, no. There's no question
4 pending.

5 THE WITNESS: Sorry.

6 THE COURT: That's okay.

7 Q. When you were told Ms. McPadden was going to
8 be terminated, did you say go ahead with the decision?

9 A. I indicated that we had made the decision on
10 what the accountability level should be. It was
11 irrelevant what level of coaching she was already on
12 because the decision was based on the infraction, not on
13 what level she was in the coaching process.

14 Q. Okay. Were you one of the decision makers?

15 A. HR advises the operators, and the operators
16 make the decision. So as I discussed it with Heather,
17 my recommendation was a second level. Heather was
18 really the decision maker.

19 Q. And actually, Joe Certo was the other
20 operator, right?

21 A. Joe was an operator, yes.

22 Q. Okay. And so when you say that the operators
23 made the decision, that would be Joe Certo and Heather
24 McCaffrey, right?

25 MR. KACZMAREK: Objection.

1 THE COURT: Overruled.

2 A. My recollection is I spoke with Heather.
3 Heather is Joe's supervisor. What Heather and Joe
4 discussed -- I don't know what they discussed, but on
5 the phone I spoke with Heather, and Heather and I
6 agreed.

7 Q. Okay. And so if at any point Walmart has
8 claimed that you were an actual decision maker, that's
9 not accurate because you give recommendations and the
10 operators make decisions?

11 A. That is our process.

12 Q. Okay. And so if you could just look back
13 at -- have you ever given sworn testimony suggesting
14 that you were a decision maker in this issue?

15 A. Again, we give advice. Our advice is then
16 either taken or not taken. That is the option that they
17 have. I don't enforce my decision. My decision was to
18 give the advice that it would be a skip level coaching.

19 Q. And my question to you is, have you ever given
20 sworn testimony in this matter suggesting that you were
21 a decision maker?

22 A. I'm sorry. I don't know. My deposition was
23 six hours. I don't know if I ever said anything.

24 Q. Okay. Can you take a look back at Exhibit 96,
25 please, to refresh your recollection.

1 Ms. Kulwicki, do you know what an affidavit
2 is?

3 A. Yes.

4 Q. Okay. And that's a statement that you're
5 making under oath, just like testimony at a deposition
6 or in court?

7 A. Yes.

8 Q. Okay. And just looking at paragraphs 5, 6, 7
9 and 8, will you agree with me that in your sworn
10 testimony you suggested that it was you and Ms.
11 McCaffrey who made the decision?

12 A. We discussed the situation and we came to
13 agreement on what the accountability level should be.

14 Q. Okay.

15 A. Again, you know, we made the decision. Now,
16 Heather has the autonomy to take that decision or not
17 take that decision.

18 Q. Okay. So are you now saying you were a
19 decision maker or you weren't a decision maker?

20 A. I did not make the decision to coach Maureen.
21 I made the decision that it was appropriate to do a skip
22 level accountability for losing the keys.

23 Q. Okay. So now -- my question is -- you've said
24 pretty clearly you were not a decision maker. And so my
25 question to you is, when you gave sworn testimony that

1 said you were a decision maker, are you correcting that
2 and changing your testimony here to say that you were
3 not a decision maker, you just made recommendations?

4 MR. KACZMAREK: Objection.

5 THE COURT: Overruled.

6 A. I don't think that -- I see the confusion. I
7 made the decision that it was appropriate to do a skip
8 level coaching. I made that decision and I communicated
9 that decision to Heather.

10 Now, Heather has the autonomy to either accept
11 or not accept that decision. So she was making the
12 decision whether or not to accept what I had decided as
13 far as the accountability level. I don't impose that
14 accountability level on an associate. My decision is
15 the decision to communicate that to the operator. The
16 operator then decides whether or not to implement that
17 decision.

18 Q. Okay. So I'm understanding you correctly
19 when -- to be saying you make recommendations, and Ms.
20 McCaffrey, and possibly Mr. Certo, are the ones who make
21 the decision?

22 A. Yes.

23 Q. Okay. And I believe that you wrote -- after
24 you participated in the McPadden discussion you wrote on
25 your copy of the matrix second level discipline, right?

1 A. Yes.

2 Q. Okay. And that's because this was sort of the
3 new matrix and you wanted to remember that if a
4 pharmacist loses the key and properly reports it, second
5 level discipline is what you thought was appropriate?

6 A. Yes.

7 Q. Okay. Before we leave the McPadden issue, I
8 just want to go back to your role as the senior human
9 resource person.

10 We've talked about the fact that you are --
11 one of your biggest job responsibilities is to make sure
12 that Walmart is complying with the law, right?

13 A. Yes.

14 Q. And to do that you have to obtain the
15 information necessary to make sure that a decision is
16 not motivated by something unlawful, right?

17 MR. KACZMAREK: Objection.

18 THE COURT: Overruled.

19 A. Yes.

20 Q. Okay. So with respect to Ms. McPadden, you
21 didn't solicit or request or talk about any information
22 to help you understand whether Ms. McPadden's discipline
23 could have been motivated by something unlawful?

24 MR. KACZMAREK: Objection.

25 THE COURT: Overruled.

1 A. I expect that district managers and regional
2 managers are going to provide relevant information to
3 me.

4 Q. So does that mean you don't ask any questions
5 to make sure that Walmart is complying with the laws?

6 MR. KACZMAREK: Objection.

7 THE COURT: Well, overruled.

8 A. In this case we were discussing the losing of
9 the key, and that was a fact, and that's what the
10 discussion was centered on. It was not based on any
11 particular individual. It was -- the discussion was
12 around losing the keys and what the accountability level
13 should be.

14 Q. But based on Walmart's policies and your
15 knowledge of ensuring compliance with Walmart's policies
16 and the law, one of the things that you would want to
17 make sure is that someone was not taking -- advocating
18 or taking steps to get more severe discipline than would
19 normally be imposed because of protected activity?
20 Isn't that part of your job?

21 MR. KACZMAREK: Objection.

22 THE COURT: Overruled.

23 A. I really had no indication that there was any
24 animus toward any associate. The concern was the
25 security of the pharmacy and losing the keys.

1 Q. So let me just back you up for a moment. You
2 say you don't have any evidence, but you don't even
3 remember speaking with Mr. Certo, right?

4 A. No. I was speaking with Heather.

5 Q. Okay. And so if Mr. Certo was escalating the
6 issue, or advocating for harsher discipline, that's not
7 something that you would know unless you asked?

8 A. No one was really advocating for any type of
9 discipline. The discussion was around what should the
10 discipline be.

11 Q. Well, let me just bring to your attention the
12 fact that Ms. McCaffrey testified this morning that
13 before she even had the conference call with you Mr.
14 Certo had told her that Ms. McPadden did not appear to
15 take the matter seriously. Would you consider that --

16 MR. KACZMAREK: Objection.

17 THE COURT: Sustained. This witness need not
18 comment on other evidence.

19 Q. Did anyone tell you that Mr. Certo had passed
20 on information to Ms. McCaffrey that Ms. McPadden didn't
21 take this issue seriously?

22 MR. KACZMAREK: Objection.

23 THE COURT: Overruled. Did anybody tell you
24 that?

25 THE WITNESS: No.

1 Q. Is that information that you would have wanted
2 to have?

3 MR. KACZMAREK: Objection.

4 THE COURT: Sustained. I'm not sure I see the
5 relevance. Sorry. Do you want to approach?

6 MS. IRWIN: No. That's okay. I'll move on,
7 your Honor.

8 THE COURT: All right.

9 Q. And we've already gone through -- Mr. Certo
10 hadn't told you, and Ms. McCaffrey didn't tell you, of
11 any of Ms. McPadden's protected activity?

12 A. No.

13 Q. Okay. And when you are fulfilling your duty
14 to make sure that Walmart is not violating any laws and
15 it's ensuring legal compliance, you don't ask, and you
16 didn't ask in this case, whether Ms. McPadden had
17 recently taken a leave or raised any legal or safety
18 concerns?

19 A. No, I did not.

20 Q. And I think you -- you just hope that you have
21 all of the relevant information when you're considering
22 the situation?

23 A. I expect that I am given that information.

24 Q. You would expect that you would be given it?

25 A. Yes. Any relevant information.

1 Q. Okay. And it's one of your goals to make sure
2 that disciplinary decisions are not motivated by
3 discrimination or retaliation, right?

4 A. That's correct.

5 Q. And it's a goal because that's what the law
6 requires, right?

7 A. Yes, yes.

8 Q. Now, I would just like to turn --

9 MS. IRWIN: Your Honor, I probably have at
10 least twenty more minutes. I don't know when the best
11 time for a break is.

12 THE COURT: All right.

13 Members of the jury, would you like to go
14 twenty more minutes, or would you like to break for
15 lunch now? Those who would like to break for lunch now,
16 raise your hand.

17 (No juror raises his or her hand)

18 All right. We'll go twenty more minutes.

19 MS. IRWIN: All right. Thank you, your Honor.

20 Q. Now, Ms. Kulwicki, I would like to talk about
21 Andy Tau. We talked about Mr. Tau at your deposition
22 just a couple months ago, remember?

23 A. Yes, I do.

24 Q. And you had a recollection of the Andy Tau
25 issue back then, right?

1 A. Yes.

2 Q. Okay. And you told me that you had been
3 consulted about Andy Tau, who was a pharmacist in the
4 same region as Ms. McPadden, right?

5 A. Yes.

6 Q. And he had also lost his key and properly
7 reported it like Ms. McPadden?

8 A. Yes.

9 Q. Okay. And you were actually involved in
10 approving the discipline for Mr. Tau, right?

11 A. I was.

12 Q. Okay. But when you were asked about two
13 months ago, you thought -- and actually you didn't
14 hesitate at all, and said that the reason -- that you
15 had become involved after the discipline was already
16 imposed, right?

17 A. Yes.

18 Q. Okay. But that's not true, right?

19 A. That's correct.

20 Q. Okay. And it is true that Lurene Riel called
21 you to tell you about Mr. Tau, right?

22 MR. KACZMAREK: Objection.

23 THE COURT: Overruled.

24 A. I did talk with Lurene, yes.

25 Q. Okay. And it's your understanding that she

1 contacted you because she had been told that Maureen
2 McPadden had received a second level discipline for
3 losing the key and properly reporting it?

4 A. Yes.

5 Q. So that's why she was consulting with you, to
6 make sure that there was consistency?

7 A. She had called me because -- and I have no
8 memory of an e-mail that we had corresponded before
9 where she had asked for us to do a next level coaching
10 and I had supported that. I don't have any memory of
11 that e-mail, but she called me then after she learned of
12 the skip level.

13 Q. Okay. So why don't we just -- let's pull up
14 Exhibit 82.

15 MS. IRWIN: Your Honor, defense counsel has
16 agreed that the ID can be stricken from Exhibit 82. We
17 ask that it be stricken.

18 THE COURT: ID may be stricken on 82.

19 (Plaintiff's Exhibit 82 Admitted)

20 Q. Okay. Ms. Kulwicki, I just want to start out
21 by saying you know that we did not have this e-mail
22 produced to us until after your deposition, right?

23 A. Yes.

24 Q. Okay. So we didn't have this e-mail to talk
25 about during your deposition and you didn't talk about

1 the e-mail, right?

2 A. And I had no memory of this e-mail.

3 Q. Okay. So at your deposition you testified
4 that you had been told about Mr. Tau after the first
5 level discipline had already been imposed, and because
6 it had already been imposed you didn't want to undo it
7 and you let it go?

8 A. And I think I also talked about the
9 differences in the situation, yes.

10 Q. Yeah, we'll get to that.

11 Okay. You were told that Mr. Tau thought he
12 lost his key in the snow in the parking lot, right?

13 A. Yes.

14 Q. Okay. And it was your understanding that Ms.
15 Riel had issued the first level on her own without
16 getting a recommendation from HR?

17 A. I did not recall this e-mail. So when we
18 spoke, yes, that was my understanding.

19 Q. Yeah, and that was your testimony. And you
20 decided to leave it as a first level and then you tried
21 to explain the difference, right?

22 MR. KACZMAREK: Objection.

23 Q. The difference between Mr. Tau losing his key
24 in the snow and Ms. McPadden losing her key either in
25 the parking lot or at her house?

1 A. I think it was reverse, where we talked about
2 the differences and then decided to leave it as a first
3 level coaching -- or a next level coaching.

4 Q. Okay. And if you could -- when you talked
5 about the difference between Mr. Tau and Ms. McPadden,
6 you believe the difference is that -- there was a
7 difference between this pharmacist losing his key due to
8 the situation of the snowstorm versus someone that
9 simply lost control of the key. Do you remember? Is
10 that true?

11 A. That's part of it, yes.

12 Q. Is there something else that we didn't talk
13 about?

14 A. Well, I think that -- you know, the fact that
15 he reported it before he even left the premises, before
16 the pharmacy was closed, and so the pharmacy was never
17 unsecured where we didn't know that the key was missing.

18 Q. And one of the main things that you have
19 previously told us was that it was a big deal that Mr.
20 Tau reported the key immediately, right, as soon as he
21 realized that the key was lost?

22 MR. KACZMAREK: Objection.

23 THE COURT: Overruled.

24 A. I think it's -- yes, I think that it's
25 important that he reported it and had not left the

1 premises, the pharmacy had not been closed, and
2 therefore, we could ensure the security of the pharmacy
3 knowing that a key was missing.

4 Q. Okay. And so back at your deposition you --
5 and I just want to know if this is sort of still true.

6 It was very significant to you that you didn't
7 know that for Mr. Tau the pharmacy hadn't actually been
8 rekeyed for several days?

9 A. No, I didn't know that.

10 Q. Okay. But when we look at the e-mail that
11 actually is contemporaneous, it's a day after Mr. Tau
12 lost his key, you were actually told that the pharmacy
13 had not been rekeyed.

14 MR. KACZMAREK: Objection.

15 THE COURT: Overruled.

16 A. I did not notice that in the e-mail or it
17 didn't strike me that -- yeah, it is there. I see it.

18 Q. Okay. You see it?

19 A. Yes.

20 Q. When you previously testified, it was very
21 significant to you that the pharmacy was somehow more
22 secure because he reported it right away. But in fact,
23 that pharmacy wasn't rekeyed for several days and you
24 were told that right at the time, right?

25 A. I don't really --

1 MR. KACZMAREK: Objection.

2 THE COURT: Just a second.

3 MR. KACZMAREK: The Judge hasn't ruled on it
4 yet.

5 THE WITNESS: Oh, I'm sorry.

6 THE COURT: I just need to read it.

7 Overruled. You may answer.

8 A. Okay. What was the question? I'm sorry.

9 Q. It was very important to your
10 distinguishing at your -- to distinguish Mr. Tau getting
11 a first level discipline from Ms. McPadden getting a
12 second level discipline. It's very important to you
13 that somehow in your analysis the pharmacy was not
14 unsecure because he reported it right away. And you
15 said you thought that the pharmacy had been rekeyed.
16 You didn't know that it had been several days, right?

17 THE COURT: Okay. As we discussed --

18 MS. IRWIN: That's a hard question. Let me go
19 back.

20 THE COURT: It's not that. It's as we
21 discussed at sidebar. The witness is here. Ask her
22 what was important to her. If there's some change
23 between that and -- some difference, then use the
24 deposition.

25 You're really asking her -- you're

1 recharacterizing her deposition and then asking her to
2 subscribe to it. Just ask her what she thinks.

3 MS. IRWIN: Okay.

4 Q. Ms. Kulwicki, first let me just make sure.
5 You did actually receive this e-mail back on December
6 15th of 2013, right?

7 A. Yes, I did. Sunday, December 15th.

8 Q. Okay. And we know that because you got the
9 e-mail and you responded to it?

10 A. Yes.

11 Q. Okay. And in the e-mail Ms. Riel specifically
12 told you that the pharmacy had not yet been rekeyed?

13 A. Yes, she does.

14 Q. Okay. And if the pharmacy hadn't been rekeyed
15 and the keys were lost somewhere in the parking lot,
16 isn't it true that someone could have found the key
17 right there in the parking lot and gone to use them at
18 the store?

19 A. Sure.

20 Q. So because the pharmacy wasn't rekeyed it's
21 actually more likely to be a security breach with keys
22 just floating out there in the snow in the parking lot?

23 A. Yes, yes.

24 Q. And you never had any information to suggest
25 that Maureen had not reported the loss of the key right

1 away?

2 A. No.

3 Q. Okay. And I think you -- you didn't even look
4 at the matrix when the Mr. Tau issue was brought to your
5 attention, right?

6 A. No. Quite frankly, I had forgotten about the
7 previous situation.

8 Q. But I thought you told -- I think that you've
9 testified that the reason that Ms. Riel was reaching out
10 to you was because it had come to light that Maureen
11 McPadden had received a second level discipline.

12 A. Yes, she did.

13 Q. Okay. So that's why she was coming to you,
14 and you knew that?

15 MR. KACZMAREK: Objection.

16 A. She told me that.

17 Q. Okay.

18 THE COURT: Sustained. I mean overruled.
19 Sorry. Overruled.

20 Q. So when Ms. Riel was seeking advice to be
21 consistent, it was specifically to be consistent with
22 respect to what had been imposed on Ms. McPadden?

23 A. Yes. But it was after -- after this e-mail.
24 It wasn't simultaneous with this e-mail.

25 Q. Okay. And I apologize because we didn't have

1 this e-mail at your deposition so I'm sort of starting
2 over here.

3 A. Right. We did not.

4 Q. So you're telling me first you got this
5 e-mail?

6 A. On a Sunday, yes.

7 Q. Okay. And Ms. Riel told you full information
8 in writing, correct?

9 A. Uh-huh. Yes.

10 Q. And actually in this e-mail she told you that
11 she had checked with her peers at the store level.
12 Who's the AP?

13 A. Asset Protection.

14 Q. And HR, is that the store level HR?

15 A. I would assume so. Either store level or
16 market level.

17 Q. Okay. And she told you that she had checked
18 with them to see what they thought the proper
19 accountability should be, right?

20 A. Uh-huh.

21 Q. And they had thought that next level, meaning
22 first level, was appropriate because he notified
23 everyone as soon as possible and did what he could to
24 find the keys?

25 A. Yes.

1 Q. Okay. And then Ms. Riel told you, I would
2 totally agree that this would be the next level of
3 coaching, right?

4 A. Yes.

5 Q. And then she says, "I am supposed to inform
6 Barb if we need to coach a pharmacist on doing so. I
7 want to be consistent in the region and division
8 market." Right?

9 A. Yes.

10 Q. So she gave you the information that he had
11 lost it; it had not been rekeyed yet; that she sought
12 advice from her peers; that they had thought first
13 level; that she agreed that first level was appropriate;
14 and based on all of that information you said I agree
15 with that first level coaching, right?

16 A. In this situation, yes.

17 Q. Okay. And then I think what you're telling me
18 is somebody said, uh-oh, after that; is that right?

19 MR. KACZMAREK: Objection.

20 THE COURT: Overruled.

21 A. Yes.

22 Q. Okay. So what happened after the e-mail? Are
23 you saying after the e-mail someone reminded you -- that
24 just a year earlier it had been the very first time you
25 had ever dealt with a pharmacist losing a key under the

1 matrix, and somebody reminded you of that?

2 MR. KACZMAREK: Objection.

3 THE COURT: Overruled.

4 A. Yes.

5 Q. Okay. And even then you didn't go back and
6 look at the matrix, because you've already -- you didn't
7 go back and look at the matrix and see that it said
8 second level on it, right?

9 A. I'm not -- well, okay. So the e-mail came in
10 on a Sunday, and I probably responded to this from home
11 and did not have the matrix with me.

12 So when she called -- and again, I'm not sure
13 exactly whether it was Monday, Tuesday, a couple days
14 later, and I'm not sure how she learned that there had
15 been a second level coaching for losing the keys, but
16 that's what she was calling about at that time.

17 So it was not Sunday that we talked about
18 this. It was after the coaching had already been given.

19 Q. Okay. And so it was after you had already
20 agreed to first level coaching?

21 A. Yes.

22 Q. Okay. And even when she called -- and I
23 believe you testified that you thought it was because
24 Heather McCaffrey had pointed out that Ms. McPadden had
25 received a second level discipline, right?

1 A. I assumed it was. Heather was regional that
2 both Joe and Maureen reported to, so I assume that's
3 where she learned of it, but it could have been someone
4 else. It could have been some other way.

5 Q. And certainly even when Ms. McCaffrey was on
6 maternity leave I'm sure there were occasional phone
7 calls that could take place.

8 A. Walmart's policy is that we do not call people
9 on leaves -- when they're on a leave of absence.

10 Q. Okay. So somehow Ms. Riel learned that Ms.
11 McPadden had been given a second level discipline for
12 losing and reporting. And by this point you had already
13 approved it based on the information that Ms. Riel
14 provided to you, right?

15 A. Yes.

16 Q. Okay. And then you say there's a phone call
17 and they ask you if it should be changed, because now we
18 have a difference in treatment, right?

19 A. Yes.

20 Q. Okay. And you didn't look at the matrix at
21 that point either, right?

22 A. I looked at the situation again.

23 Q. My question is, did you look at the matrix?

24 A. I don't recall looking at the matrix, but I
25 did have the matrix in my office. I don't recall

1 looking at it per se.

2 Q. Okay. If you could just turn to page 145 of
3 your deposition.

4 A. Okay.

5 Q. Just because we went over it really clearly.
6 I just want to make sure it's clear.

7 Do you see at page 145, towards the top, I
8 asked you, "Did you look at the matrix when you were
9 talking to Ms. Riel?" And you answered, "I had
10 recollection from prior looking at the matrix. I did
11 not pull it out again."

12 A. Okay.

13 Q. Is that true?

14 A. I would assume so.

15 Q. Okay. And if you had a prior recollection of
16 the matrix, you would have remembered that you wrote
17 second level for the first time that you dealt with the
18 loss of a key, right? You wrote it right on there.

19 A. I did write it right on there, on my copy of
20 the matrix, but I did not recall it. I made a mistake.

21 Q. Okay. And again, before you remembered this
22 e-mail had occurred, it's your belief that the pharmacy
23 was secure in Mr. Tau's case because he had reported the
24 loss and you didn't know that the pharmacy had not been
25 rekeyed?

1 A. No, I did not know when they rekeyed the
2 pharmacy.

3 Q. Okay. And you didn't -- you claimed that you
4 didn't know that it hadn't been rekeyed by the time he
5 left, right?

6 A. I'm sorry. By the time I left?

7 Q. By the time Mr. Tau left the pharmacy. I'm
8 sorry.

9 A. No, I did not know.

10 Q. Okay. But you really did know because it was
11 in the e-mail, right?

12 A. It is in the e-mail that they were working on
13 it then.

14 Q. And actually you've stated, and you believed,
15 that if Ms. Riel had consulted with you first, you would
16 have recommended a second level discipline, but she had
17 not consulted with you first.

18 A. Had I recalled, I would have been consistent.

19 Q. Had you recalled what?

20 A. When I responded to this e-mail, had I
21 recalled the second level coaching I would have tried to
22 be consistent.

23 Q. Okay. And all that would have required would
24 be for you to pull out the matrix, which you said was
25 the key document to look at, and you had written right

1 on it second level?

2 A. Yes. But this was a Sunday that I responded
3 to this. I wasn't at the office, and I didn't have that
4 matrix right there with me.

5 Q. And you didn't even look at it later when you
6 talked to Ms. Riel on the phone?

7 A. At that point I have recollection when she
8 brought that up to me.

9 Q. Okay. And even when it was specifically
10 brought up to you that there was a second level
11 discipline, you said, fine, leave Mr. Tau as it is?

12 A. We discussed the fact that there was some
13 differences between the two situations.

14 And since he had already been coached, I did
15 not believe it was the proper thing to go back and say,
16 oh, we really need to coach at a different level now.

17 Q. I'm just going to show you -- this,
18 unfortunately, has tiny, tiny print. I need to put on
19 my glasses to see it myself.

20 This is Exhibit 3, and I'll represent to you,
21 ma'am, that this is the documentation produced by
22 Walmart relating to Andy Tau's disciplinary record.
23 Okay?

24 A. Okay.

25 Q. And if we look at the second page of this, it

1 tells us when the discipline was given, right?

2 A. That certainly appears that way.

3 Q. Okay. And it says that the discipline was not
4 given to Mr. Tau until December 19th of 2013, right?

5 A. I can't see the name on this, but it does say
6 given date.

7 Q. It's on the first page where it says Sze Chuen
8 Tau. I think he goes by Andy.

9 A. Okay.

10 Q. Can you see that?

11 A. Yes.

12 Q. Okay. And then this is the second page that
13 talks about this discipline, and the given date is
14 December 19th. Do you see that?

15 A. Yes.

16 Q. And we know the offense occurred -- in terms
17 of the loss of the key, occurred right on -- it lists it
18 as December 14th, right?

19 A. Yes. That's what it says.

20 Q. So you don't have any reason to dispute
21 Walmart's documentation of the timing of that
22 discipline, do you?

23 A. No. It's systematic.

24 Q. Okay. So when they're disciplined, it goes in
25 the system?

1 A. That's my understanding, yes.

2 Q. Okay. So there were several days in between
3 your approval of first level to when the discipline was
4 actually given to Mr. Tau?

5 A. Yes. It appears to be.

6 Q. Okay. And just back to Exhibit 82 for a
7 moment.

8 One of the things that Ms. Riel told you when
9 she was telling you that she thought first level was
10 appropriate was that the pharmacy did have an alarm that
11 was set, right?

12 A. Yes.

13 Q. Okay. And Lurene Riel was a market manager
14 just like Mr. Certo was, right?

15 A. Yes.

16 Q. And in the same division?

17 A. Yes.

18 Q. Okay. And so Ms. Riel was the one who was
19 providing the information and telling you that she
20 thought first level was appropriate?

21 A. Yes.

22 Q. And you agreed?

23 A. Yes.

24 MS. IRWIN: If I could just take one moment,
25 your Honor.

1 THE COURT: Certainly.

2 (Attorney Irwin confers with Attorney
3 Fradette)

4 Q. I guess I just have one last question. You
5 understand that Andy Tau is male, right?

6 A. I would assume so.

7 MS. IRWIN: Okay. Thank you.

8 THE COURT: All right. We'll wait and have
9 lunch.

10 Ladies and gentlemen, we'll take our lunch
11 break now. Why don't we say 1:20, thereabouts. No
12 pressure. But probably around 1:20 we'll resume.

13 (RECESS)

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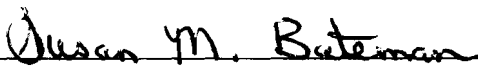
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C E R T I F I C A T E

I, Susan M. Bateman, do hereby certify that the foregoing transcript is a true and accurate transcription of the within proceedings, to the best of my knowledge, skill, ability and belief.

Submitted: 2-9-16


SUSAN M. BATEMAN, LCR, RPR, CRR
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